STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 10, 2002
v	No. 233617 Cass Circuit Court
TERRELL MICHAEL BLACKAMORE, Defendant-Appellant.	LC No. 00-010384-FH

Before: Sawyer, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession with intent to deliver less than 50 grams of cocaine. MCL 333.7401(2)(a)(iv). He was sentenced as a habitual offender (second offense) to serve twenty-one months to thirty years in prison. He now appeals and we affirm.

Defendant's conviction arises out of a controlled buy by an informant, Andrea Nash, on June 14, 2000. Nash had approached the police about being an informant and, in particular, her desire to assist police in establishing a case against defendant. According to Nash, defendant had been a drug dealer for several years and had sold drugs to Nash's brother. Her brother committed suicide in 1996, which she ascribes as the effects of bad drugs sold by defendant to her brother.

Defendant first argues that the trial court erred in admitting evidence of defendant's prior bad acts. We disagree. Before Nash testified, the prosecutor sought to admit evidence, through Nash's testimony, that she had purchased drugs from defendant in 1989 and 1990 and that defendant had sold drugs to her brother before his death. The trial court granted the motion, with some limitations, opining as follows:

> The Court is only going to rule at this juncture on whether or not the prosecutor, who is now going to call Andrea Nash, can get into what Andrea Nash's motivation for attempting to purchase drugs from the defendant is, and that's because you've already opened the door on that one by insinuating, as I said, that she had the drugs planted on her, and that she was trying to set up Mr. Blackamore.

> So, I think at this juncture, Mr. Teter, you can at least introduce the evidence you plan to through Andrea Nash, that is, that she had bought from him before, and she's attempting to buy from him, and her motive is not to set him up, not that she had drugs planted on her, but that her brother purchased from him, and as a result she's got a motive to try to help the police and get a buy into Terrell Blackamore.
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> . . . . if you had never cross-examined Detective Babcock about all this line of her hiding the dope in her panties, or bra, or wherever, and you didn't cross-examine him, well, I don't think that Andrea Nash's motive would have been relevant and admissible. It might had [sic] been after you cross-examined her, and maybe it would had [sic] been permissible on redirect for him to get into it. So, these rulings I think have to await developments in the trial, and I have to rule as we go. So, it's only with regard to her motive, either whether she's bought before, or her motive with regard to her brother. The rest of that stays out, unless it becomes relevant, unless the door is opened, or the Court concludes that the probative value outweighs any prejudicial impact.

Although evidence of other bad acts is not admissible to show that the defendant acted in conformity with that bad character, it is admissible for other, permissible purposes. *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000). Thus, the question is whether the evidence, under a proper theory, will make the existence of a fact of consequence more or less probable. *Id.* at 60. In the case at bar, the trial court concluded that defendant had put Nash's motivations to act as an informant into question and whether she had actually engaged in a drug transaction with defendant or whether she had feigned the transaction, using previously hidden drugs. We are not persuaded that the trial court's ruling constitutes an abuse of discretion. *Id.*

Next, defendant argues that he was denied the effective assistance of counsel. We disagree. The standards for reviewing a claim of ineffective assistance of counsel were reviewed in *People v Carbin*, 463 Mich 590, 599-600; 630 NW2d 620 (2001):

> A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and

prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant raises two claims of ineffective assistance. First, defendant claims that trial counsel was ineffective by failing to raise an entrapment defense. We disagree. The Supreme Court recently reviewed Michigan's entrapment rule in *People v Johnson*, 466 Mich 491, 498; 647 NW2d 480 (2002):

> Under the current entrapment test in Michigan, a defendant is considered entrapped if either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated. [*People v Juillet*, 439 Mich 34; 475 NW2d 786 (1991)]; *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). However, where law enforcement officials present nothing more than an opportunity to commit the crime, entrapment does not exist. *People v Butler*, 444 Mich 965, 966; 512 NW2d 583 (1994).

Johnson, *supra* at 498-499, went on to list factors to be considered in determining if the government impermissibly induced the defendant to commit a crime:

> (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrest, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted.

Defendant points to nothing that establishes entrapment. Defendant argues that Nash's desire to get defendant was a "red flag." While Nash's motivations may suggest she would be willing to entrap defendant, it is still necessary for defendant to show more than motivation, but actual actions that constitute entrapment. On this point, defendant argues that Nash admitted that defendant told her that he did not have any drugs and that he indicated he could acquire drugs for her only after she continued harassing him. Nash's testimony upon which defendant relies was as follows:

> Q Okay. And did you tell him that you wanted to purchase some [drugs]?
>
> A Yes, I did.
>
> Q Okay. How did you say that?
>
> A I just wondered if he could get me some crack cocaine, and he said, "Yeah."

Nash's testimony before this point described her and defendant sitting on the porch at defendant's house talking about drugs, then going inside. After the above exchange, Nash describes defendant making a phone call and Nash then driving defendant to the place where he procured the drugs. Defendant then gave the drugs to Nash. Nothing in Nash's testimony remotely describes harassment of defendant or an unwillingness by defendant to procure the drugs. Accordingly, we conclude that defendant has failed to show any likelihood whatsoever that an entrapment defense would have been successful if raised in the trial court.

Defendant also claims that counsel was ineffective by failing to give an opening statement. We disagree. After the prosecutor gave his opening statement, defense counsel indicated that he wished to reserve opening statement. A criminal defendant has a right to give an opening statement immediately after the prosecutor's opening statement or to reserve it until after the prosecution rests. MCR 6.414(B). After the prosecution rested, the defense rested without making an opening statement or presenting any witnesses.

On appeal, defendant argues that defense counsel missed a "golden opportunity" to present defendant's version of events to the jury before any testimony was given. Defendant, however, fails to show how this did not constitute sound trial strategy. While it is true that an early opening statement can lay a framework for the jury to follow when it hears evidence, it is also true that an early opening statement commits the defendant to a particular version of events and the jury will look to see if that version is supported by the witnesses. It is reasonable for a defense attorney to reserve opening statement, thus retaining greater flexibility in tailoring the defense to the case actually presented by the prosecutor. This is particularly true in the case at bar where the trial court had reserved ruling on the issue of the admissibility of defendant's prior bad acts. Thus, with the exact nature of the prosecutor's case in limbo in this regard, it was even more reasonable for counsel to take a "wait and see" position with respect to the defense to be presented and, therefore, reserve opening statement. Then, once defense counsel made the final determination not to present any witnesses, including defendant, there was no reason to give an opening statement.

Defendant essentially argues that no opportunity for a criminal defendant to present his version of the case should be thrown aside. We are not willing to say that the failure to give an opening statement constitutes ineffective assistance of counsel as a matter of law. In sum, defendant does not overcome the strong presumption that trial counsel's strategy was sound trial strategy.

Finally, defendant argues that there was insufficient evidence to support his conviction. We disagree. In reviewing a sufficiency of the evidence argument, we must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could determine if all of the elements of the offense were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

In the case at bar, Nash testified that defendant possessed the cocaine, which he gave to her. Further, there was testimony that laboratory analysis confirmed that it was, in fact, cocaine. Defendant's argument that was insufficient evidence centers on the fact that no one other than Nash saw defendant with the cocaine or deliver the cocaine to Nash. Defendant further argues

that, given Nash's motivation for revenge against defendant, her testimony was suspect.[1] However, it is not our role to judge the credibility of the witnesses. The jury knew of Nash's motivations in this case, as well as any opportunity to have hidden the drugs and falsely claim that she received them from defendant, as well as any inconsistencies in the testimony. Having weighed all those factors, the jury obviously chose to believe Nash's testimony. That is their prerogative. It is not ours to disagree with the jury. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). In short, the jury could choose to believe Nash's testimony and, having done so, there was sufficient evidence to support defendant's conviction.

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Michael J. Talbot

[1] Defendant's theory of the case was essentially that Nash hid the drugs in her bra or panties and lied that she had received the drugs from defendant. Defendant did establish that, during the search before the controlled buy, the police did not pat down her breasts or search her panties because no female officer was present.